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IN THE

Supreme Court of the United States

October Term, 1958

No. 607

THE BRADFORD MACHINE TOOL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 29, 1958, which ordered the petition, for review of the decision of the Tax Court of the United States, dismissed upon the ground that Section 732(c) of the Internal Revenue Code of 1939[1] applied and the Court of Appeals had no jurisdiction to review.

[1] Unless otherwise indicated section references are to the 1939 Code.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A hereto, page 24. It appears in 1958 P-H. Federal Tax, Par. 58-5278.

The opinion of the Tax Court is printed in the Appendix, pp. 85a to 87a, of the certified record of the Court of Appeals. It appears in Par. 57.055 1 .H.T.C. (T. C. Memo, 1957-55).

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1958.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court in this proceeding, as to the issues raised by the Petitioner therein, which issues were decided against the Petitioner?
2. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court, affirming the Commissioner's **disallowance of Petitioner's claims (1) under § 710(c)(3)(A) for the benefit of carry-back** of its unused excess profits credit for 1944 and for refund of excess profit taxes paid by Petitioner during the years 1942 and 1943, **and (2) under § 124 for shortening the amortization period** an claims for refund by reason thereof against excess profits taxes paid by Petitoner for 1942 and 1943?
3. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court on the issue, presented by Petitioner therein, that **the doctrine of collateral estoppel was applicable**, which issue the Tax Court decided against the Petitioner?
4. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax

Court on the issue, presented by Petitioner therein, that **The Commissioner in 1952 is bound as a matter of law by the discretionary and administrative decision made by his predecessor in 1943**, determining that Petitioner is entitled to relief under § 722 and then determining the amount of such relief and applying such CABPNI in the determination of Petitioner's excess profits tax liability for 1941, no adjustment thereof being required under any statute applicable to the base period years or to any subsequent excess profits tax taxable year, and there being no finding of mistake of law in the prior discretionary and administrative decision, which issue the Tax Court decided against the Petitioner?

5. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court on the issue, presented by Petitioner therein, that **the doctrine of res judicata is applicable to the discretionary and administrative decision by respondent's predecessor with respect to the factual determinations** therein as to Petitioner's right to relief under § 722 and the amount thereof, an essential element of tax liability necessary to be determined and used in computing Petitioner's excess profits credit and excess profits tax for 1941, which issue the Tax Court decided against the Petitioner?
6. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court on the issue, presented by Petitioner therein, that Petitioner as a matter of law had the right, in computing its excess profits tax for each excess profits tax taxable year **after 1941 to apply and use its right to relief under § 722 and the amount thereof (CABPNI)**, previously determined by the predecessor commissioner, there being no adjustment thereof required under any statute applicable to the base period years or any subsequent year, and no finding of mistake of law in the prior discretionary and administrative decision; which issue the Tax Court decided against the Petitioner?
7. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax

Court, on the issue, presented by Petitioner therein, that the **Commissioner in 1952 had no authority as a matter of law to disregard the discretionary decision of his predecessor,** determining the issue of relief under § 722 in favor of Petitioner, and to proceed to re-examine, reconsider the same facts, with respect to the base period 1936-1939, inclusive, upon which his predecessor had determined such relief issue, **and to come to an opposite determination on the same facts,** without setting aside the discretionary decision of his predecessor and without making any finding that it was erroneous by reason of any fraud, mistake, or gross error, which issue the Tax Court decided against the Petitioner?

8. Does § 732(c), properly construed, deprive the Court of Appeals of jurisdiction to review the decision of the Tax Court herein and determine that **the statute of limitations, § 275,** prohibiting reopening and redetermination of Federal taxes for any year after three years after the return therefor was filed, **barred the reversal, in 1952 by Respondent, of the factual determinations, necessarily made in the discretionary and administrative decision of his predecessor,** of the question that Petitioner had the right to relief under § 722 and of the factual determination of the amount thereof, which CABPNI was necessarily used in determining the Petitioner's excess profits taxes for 1941, this statute having intervened and the three-year period expired prior to the 1952 decision of Respondent, thereby prohibiting the reopening of the factual relief determinations of essential elements of tax liability necessarily made in connection with Petitioner's tax liability for 1941?

STATUTES INVOLVED

Relevant parts of federal statutes involved are set forth in [2] Appendix C hereto, pages 28 to 38.

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[2] All "p. ——" refer to this petition and the appendices hereto. All "p. —— a" refer to pages of the printed appendix of the certified record of the Court of Appeals.

STATEMENT

(1) Petitioner Filed Claims For Refunds Under Sections Other Than § 722.

On March 15, 1945, Petitioner filed with the Commissioner tentative claims for the benefit of carry back of its unused excess profits credit for 1944 under **§ 710(c)(3)(A)**, for refund of excess profits taxes paid by Petitioner for each of the two preceding years, 1942 and 1943.

Petitioner had an unused excess profits credit for 1944, as its excess profits credit for that year exceeded its excess profits net income for that year. It was entitled to use it as the basis of its above claims for refunds for such loss carry-back. (Stip. 38, App. 63a)

Sec. 710(c)(3)(A) provides:

> "If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be **an unused excess profits credit carry-back for each of the two preceding taxable years, . . .**"[3]

Reg. 112, § 35.710-3(a) provides:

> "In the case of a taxpayer entitled to use the excess profits credit based on income or the excess profits credit based on invested capital, the credit which results in the larger unused excess profits credit is used."

Petitioner's excess profits credit based on income was larger than its excess profits credit based on invested capital, and resulted in larger unused excess profits credit for 1944. Petitioner's excess profits credit for each taxable year based on income is computed under § 713(a)(1)(A) by taking 95% of the **Average** Base Period Net Income (ABPNI).

[3] All emphasis supplied, except as indicated in italics.

However, Petitioner was entitled to relief under § 722 by authority of the discretionary decision made by respondent's predecessor. (App. 83a) Petitioner used its relief in the amount of the **Constructive Average** Base Period Net Income (CABPNI), so previously determined, in lieu of its average base period net income (ABPNI), in computing its excess profits credit, and excess profits taxes, shown on its returns for 1942 through 1945. (App. 83a)

On May 22, 1956, Petitioner filed final amended claims for such refunds. (App. 64a) These final claims included an additional amortization deduction and claim for refund against excess profits taxes paid by Petitioner for 1942 and 1943, as Petitioner had elected to shorten the amortization period, as provided in **§ 124 as amended and Reg. 111, § 29.124-5(b) and (e).**

(2) Upon Consideration of the Above Claims for Refunds Under Sections Other Than § 722, Respondent Questioned Petitioner's Right To and Use Of Its Relief Under § 722, So Previously Determined, In Computing Its Excess Profits Credit.

The above claims for refund for 1944 loss carry-back were pending when, in 1949, Petitioner was advised by the Internal Revenue Agent that exception had been taken to the **previous discretionary decision of respondent's predecessor** allowing the Petitioner's application for relief under § 722 and determining the amount thereof by allowing Petitioner a CABPNI in the amount of $121,106.62, for use in computing and determining its excess profits taxes for the year 1941. (App. 83a; Stip. 30, App. 61a; Ex. 25y, App. 72a)

Petitioner also then was further advised that the "allowance" of its CABPNI, so determined, to be used by Petitioner in determining its excess profits taxes for 1942 and subsequent years should be reconsidered. Petitioner was requested to submit additional data and statistics in sup-

port of **its eligibility for relief.** (App. 83a) Petitioner never submitted any additional data. In fact, Petitioner never submitted any additional data, at any time subsequent to November 14, 1941, when Petitioner last submitted such data. Since December 31, 1939, the end of the base period (1936 through 1939) upon which relief, so determined, is based, no adjustment of Petitioner's relief thereunder or in the amount thereof, so determined, was required by section 711(b), § 721 or § 722, or any other statute. There has been no change in the applicable relief factors affecting taxpayer after December 31, 1939. (App. 23a)

Section 732(c) names the following three sections of the Code relating to abnormalities.

Section 711(b)(1)(H), (I), (J), or (K) permitted abnormal deductions **during the base period years**, 1936 through 1939, to be eliminated in determining the ABPNI. This section requires no adjustment in Petitioner's relief, so determined, for its application in computing its excess profits credit and excess profits taxes for the years 1942 through 1945. This section is not applicable.

Section 721 permitted "abnormal" items of income realized in a taxable year **after the base period**, but attributable to other years, to be reallocated to such years. This section is not applicable.

Section 722 relates to abnormalities **in the base period**, resulting in discriminatory excess profits taxes, and to application for the determination of the right of the taxpayer to relief thereunder by deciding that amount of its CABPNI **computed upon the base period.**

Section 722(a) provides that, after decision that the taxpayer is entitled to such relief and the amount of its CABPNI has been determined,

> "**the tax shall be determined by using** such **constructive** average base period net income in lieu of the

average base period net income otherwise determined under this subchapter."

Section 722(d) provides:

"If a **constructive** average base period net income has been determined under the provisions of this section for **any** taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for **the purpose of determining the tax under this subchapter for a subsequent taxable year.**"

Reg. 112, § 35.722-5(d) provides:

"If a **constructive** average base period net income has been finally determined under § 722(a) with respect to the taxpayer, or if permission is granted by the commissioner after a determination which has not become final, **such taxpayer may use the constructive average base period net income so determined, except as further adjustment may be required by section 711(b) in computing its excess profits credit based on income, its adjusted excess profits net income and its excess profits taxes in any return required to be filed thereafter.**"

Petitioner claimed the benefits of § 722 for each subsequent year and used on its excess profits tax returns for each of the years 1942 through 1945 the CABPNI so determined, of $121,106.62, plus **the application of the 75% rule under § 713(e)** of the Code. (Stip. 39, 41, App. 64a, 83a) Petitioner on its returns used 95% thereof as its excess profits credit, thereby claiming the benefit of relief under **both § 722 and § 713(e)(1).** (Stip. 39, App. 64a, 83a)

Petitioner computed its adjusted excess profits net income and its excess profits taxes for each of these years upon the above basis. (Section 710(a) and (b); § 712, § 713 and § 722.)

(3) Petitioner Filed Only Applications For Use of the Amount of Its CABPNI, So Determined, On Its Returns for 1942 Through 1945, In Computing Its Excess Profits Credits and Excess Profits Taxes For Such Subsequent Years; Petitioner Never Filed, Within the Meaning of § 722, Any Claim For Refund of Excess Profits Taxes Computed Without the Benefit of § 722.

Reg. 112, § 35.722-5(d) provides:

> "If all or a portion of a constructive average base period net income determined for a prior taxable year is used by the taxpayer in computing the excess profits credit based on income in its return for a subsequent taxable year, such use shall be deemed to be an application by the taxpayer **for the benefits of § 722 for such subsequent year** to the extent of the **constructive** average base period net income so used in the return. Such application shall be deemed to include all the information and data submitted in support of all prior applications for relief which have been filed by the taxpayer."

On May 12, 1943, Petitioner filed its excess profits tax return for 1942. (Ex. 15-O, App. 58a)

Petitioner in this return for 1942 requested permission to use its CABPNI, so determined, on its return for 1942 and subsequent years. (Ex. 15-O; App. 67a) On June 17, 1943, Respondent's predecessor wrote Petitioner advising he had accepted the Revenue Agent's Report, dated Feb. 3, 1943. (Stip. 35, App. 62a; Ex. 29-CC, App. 77a) Petitioner also had the express permission in writing by Respondent's predecessor to use its CABPNI on its returns for subsequent years. This was done pursuant to § 722(d) and the above Regulation. Notwithstanding Petitioner had been advised on June 17 its right to relief under § 722 and its CABPNI had been determined, on September 7, 1943, Petitioner requested in writing that the Commissioner grant such permission. (Stip. 36, App. 62a; Ex. 30-DD; App. 77a)

On September 22 the Commissioner wrote Petitioner granting such permission, subject to the provisions of the above Regulation. (Stip. 36, App. 63a; Ex. 31-EE, App. 78a-80a; 83a)

Petitioner filed its returns for 1942 through 1945 and paid the amount of tax shown thereon for the respective year on the above basis. Petitioner did not, for any of the years 1942 through 1945, compute its excess profits tax, file its excess profits return, or pay its excess profits tax without the application of its relief, so determined, or, within the true meaning of § 722, file any claim for refund therefor or file any application for relief under § 722 for any of these years. Petitioner did file the following two forms. It filed Form 991 and Form 843 for 1942 under the following circumstances: which was not in substance or in effect, or within the meaning of the statute, a real or true application for redetermination of its rights to relief under § 722 or to redetermine the amount thereof, or a claim for refund of any excess profits tax computed for 1942 without the benefit of § 722.

On September 10, 1943, Petitioner filed with the Commissioner Form 991 for 1942. (Stip. 38, App. 63a; Ex. 32-FF, App. 81a, 83a) This form stated "Excess profits tax taxable year for which **the benefits of § 722 are claimed** ——". Petitioner inserted therein "1942." Petitioner filed this form in skeleton form. It filled in blanks on the first page only, stating the excess profits shown on its excess profits return for 1942, and claimed no reduction in that tax under § 722. No figures were inserted as to computation with regard to § 722; no total net relief was claimed with respect to the tax shown on the return, and no amount of refund or credit for which this claim is a claim was inserted.

Petitioner attached to this form a typewritten explanation that Petitioner used its CABPNI, so determined, in its

return for 1942, and therein requested permission to use it for subsequent years; that on June 17, 1943, the Commissioner had advised that the Revenue Agent's Report of February 15, 1943, previously determining relief under § 722, had been accepted, and that this form was filed only to comply with all technicalities of the Internal Revenue Code. (Ex. 32-FF, App. 81a, 82a)

On January 1, 1944, Petitioner filed with the Commissioner Form 843 for 1942. (Stip. 38, App. 63a) This form was likewise filed in skeleton form. The form provided: "Amount to be refunded.". Petitioner merely filled in "(See below)." The statement below states this form is being filed only to comply with all technicalities of the Internal Revenue Code, and also refers to the September 22, 1943, letter granting permission to Petitioner to use its CABPNI, so determined, on its returns. (Stip. 36, App. 63a)

(4) The Statute of Limitations, § 275(a), Prohibiting Reopening and Redetermining Federal Taxes For Any Year After Three Years After the Return Therefor Had Been Filed, Had Completely Run and Expired Several Years Prior To January 3, 1950, and Operated To Bar the Reopening of the Petitioner's Excess Profits Taxes for 1941, Or Any Factual Determination of Essential Elements of Taxation Necessarily Determined In Connection Therewith.

No Agreement, pursuant to § 276(b) extending the period of limitation upon assessment of excess profits taxes for 1941, was ever executed, and the Statute of Limitations as to that year expired in 1945. (Stip. 23, App. 59a)

To determine Petitioner's excess profits tax liability for 1941, the determination of the excess profits credit was an issue, an essential element of tax liability. It was necessary to determine that issue, by ascertaining and determining the essential fact whether the excess profits credit was to be

determined upon Petitioner's ABPNI or a CABPNI. Respondent's predecessor decided Petitioner was entitled to relief under § 722 and determined the amount of the CABPNI. Respondent's predecessor exercised discretionary and administrative judgment in making those factual determinations. Upon that basis the tax was computed and paid for 1941.

The running of the Statute of Limitations effects finality with regard to Petitioner's tax liability for 1941 and also with regard to all essential factual determinations necessarily made in connection therewith, including the issue of relief, under § 722 and the amount thereof.

The bar of the Statute of Limitations makes immaterial any question of mistake or error in the prior discretionary and administrative decision.

(5) Revenue Agent's Report, Dated January 3, 1950, Determined the Disallowances and Deficiencies, Upon Which Respondent Acted on July 21, 1952.

On January 3, 1950, the Internal Revenue Agent submitted a report concluding that Petitioner's "application for relief for 1942 and its use of the CABPNI, for the years 1943 through 1946, be denied." This report states, among other statements:

> "... the source of all information discussed herein was presented in taxpayer's supplemental data filed November 14, 1941." (Stip. 42, App. 65a; Ex. 39-MM, App. 82a-84a)

Upon receiving notice of the conclusion of the above report, Petitioner filed its protest. (Stip. 43, App. 65a)

On July 21, 1952, Respondent wrote Petitioner that he had determined Petitioner's excess profits tax liabilities for 1942 through 1945, without the application of § 722, disclosing an over-assessment for 1942 and deficiencies for

1943 and 1945. The amounts of this overassessment and of these deficiencies were the identical amounts stated in the Revenue Agent's report dated January 3, 1950.

Respondent further advised therein that he had disallowed Petitioner's skeleton Form 991, for the benefit of relief under § 722 for 1942; that he had disallowed the skeleton Form 991 and the skeleton Form 843 as to claims for refund in blank amount for 1942; and that he had disallowed the CABPNI, determined by Respondent's predecessor, used by Petitioner in its returns for 1942 through 1945. (App. 25a)

After referring to Form 991 filed on September 10, 1943, the only reason stated by Respondent as the basis for determinations of the above disallowances and deficiencies was:

> "It has been determined that you have not established your right to the relief requested in such application." (App. 25a)

Respondent computed the above deficiencies under the invested capital method. (Stip. 41, App. 64a, 65a)

This 1952 administrative decision was premised upon the Revenue Agent's Report dated January 3, 1950. This report expressly admits that its determinations were based upon no new or additional facts after November 14, 1941. (Ex. 39-MM, App. 82a-84a) In other words, the disallowance of Petitioner's right to relief under § 722 has been redetermined upon the facts as they existed at the time of the directly opposite discretionary decision by Respondent's predecessor. In the absence of evidence to the contrary, and there is none in this record, the facts as to the base period 1936-1939 are presumed to continue.

The Respondent in the above decision made no finding that any adjustment of the CABPNI, previously determined, was necessary by reason of any statute; no finding

of any mistake of law or the correction thereof; nor did Respondent expressly set aside the contrary prior discretionary decision of his predecessor (App. 25a).

(6) The Tax Court of the United States Decided That the Doctrine of Collateral Estoppel Was Not Applicable, and That No Refund of Excess Profits Tax Was Due the Petitioner for 1942 Through 1945 Under the Provisions of § 722.

Section 732(a) gives the Tax Court jurisdiction to redetermine Petitioner's excess profits tax liabilities for 1942 through 1945 in accordance with the statutes. Petitioner filed its petition in the Tax Court praying for such redetermination of disallowances and deficiencies (App. 3a-27a).

An extensive stipulation between the parties, and the exhibits attached thereto, presents the facts with respect to the discretionary decision of Respondent's predecessor that Petitioner is entitled to the right of relief under § 722 and the amount of its CABPNI then determined. (App. 56a-66a)

Petitioner presented to the Tax Court pure questions of law, based on undisputed facts in the record. It contended in the Tax Court, among other issues, that the Respondent erred and that the application of the doctrine of res judicata or collateral estoppel by the discretionary decision of Respondent's predecessor precluded Respondent as a matter of law from denying Petitioner's right to such relief and the right to use and apply the amount of such relief, so determined, in the computation of its tax on its returns for 1942 through 1945, in the absence of any change in the applicable rules of law or in the facts upon which the prior decision was based, and in the absence of any adjustment of such CABPNI being required by any statute, and in the absence of any finding of mistake of law in the prior discretionary decision. (App. 85a) No "abnormalities" question or any other question was presented to or decided by the Tax Court exclusively and solely by reason of § 722.

The decision of the Tax Court decided no issue of fact, as to the application of relief formula of § 722.

The Memorandum Opinion of the Tax Court referred to the prior discretionary decision and the prior permission to use the CABPNI, so determined, upon Petitioner's returns. (App. 85a-87a) It added the Respondent had rejected **the claims for relief represented by these returns**, and affirmed the action of the Respondent. (App. 25a-27a, 87a) The Tax Court disposed of the whole case by holding as a matter of law that the doctrine of collateral estoppel is not applicable. It decided against the Petitioner on the authority of its prior decision in the **Standard Hosiery Mills, Inc.**, 27 T. C. 58 (12-18-56). (App 87a)

The Tax Court did not expressly set aside the prior discretionary decision. It made no findings of fact other than those stated in its Memorandum Opinion. (App. 91a) It made no finding or determination as to any factual question involving the determination of "abnormalities" under § 722 or any other section of the Code. Nor does the Tax Court make any finding or determination whether "abnormalities" under § 722 justified or did not justify relief under that section. The Tax Court made no findings of mistake in the determination of the CABPNI previously determined.

The Tax Court erred, after referring to the permission given Petitioner to use previously determined CABPNI on its returns for later years, by making the following finding: "It used **that amount with the appropriate statutory adjustments** on its returns for those years." (App. 86a) There is no evidence that any such adjustments of the amount of its CABPNI, previously determined, was required by any statute, or any factual basis in the record required such adjustment.

This ruling of the Tax Court adverse to the Petitioner must be regarded necessarily as a holding against Petitioner on the issue presented by it to the Tax Court. The

Tax Court held that the doctrine of res adjudicata or collateral estoppel is not applicable to the facts of this case.

The Tax Court opinion does not mention the claims for refund, for 1944 loss carry-back, filed by Petitioner. It merely finds the Commissioner rejected "the claims for relief represented by those **returns**," of course, meaning tax returns. Such claims mentioned by the Tax Court do not refer to claims for loss carry-back and for amortization, but refer to claims for refund of excess profits taxes computed and paid without the benefit of § 722. Petitioner never computed or paid such taxes on that basis for 1942 through 1945, or made claims for refund thereof (App. 86a).

The Tax Court decided the case at bar on the authority of the **Standard Hosiery Mill** case, 27 T. C. 58. That case is distinguishable factually from the case at bar, in that the CABPNI, previously determined therein, was required to be adjusted **under § 711(b)**, because of changes in the facts during subsequent years, relating to abnormalities **within the base period years 1936 through 1939**, which required adjustment to be made for future years in the relief under § 722, determined by the prior discretionary decision of the Commissioner. No such adjustment was required in the case at bar. Of course, the doctrine of res judicata or collateral estoppel does not apply where the statute expressly authorizes such change in the prior discretionary decision. It did not apply in the **Standard Hosiery** case. But we respectfully urge the doctrine does apply in the case at bar.

The Fourth Circuit held in 1957, 249 F. 2d 469, that § 732(c) applied and it had no jurisdiction to review the above decision of the Tax Court in **Standard Hosiery Mills, Inc.**

The case at bar is also distinguishable factually from the **Patent Button case**, 256 F. 2d 726, decided June 30, 1958, by the Sixth Circuit, which presented no question as to the

application of the principles of res judicata or collateral estoppel. That case was decided on the authority of **Brown Paper Mill, Inc. v. Commissioner** (C. A. 5, 1958) 255 F. 2d 77, cert. den. The Court of Appeals in the case at bar also cited this **Brown Paper Mill** case. Likewise, in that case no question as to the application of the principles of res judicata or collateral estoppel was involved.

(7) The Court of Appeals for the Sixth Circuit Held That It Had No Jurisdiction To Review, Because § 732 Is Applicable To This Case, and Dismissed the Petition For Review.

The Petition for Review of the decision of the Tax Court herein (App. 90a-95a) alleged it was filed pursuant to § 7482 and § 7483 of the Internal Revenue Code of 1954. (App. 91a) It further alleged that the Tax Court erred as a matter of law in failing to apply the doctrine of res judicata or collateral estoppel by the discretionary decision of Respondent's predecessor as a matter of law to prohibit Respondent from denying Petitioner its right to relief under § 722, in the amount so determined, which Petitioner was entitled to use in the computation of its excess profits taxes on its returns for 1942 through 1945, under the undisputed facts in this case. (App. 94a)

Respondent filed with his brief a Motion to Dismiss the petition upon the ground that the Court of Appeals had no jurisdiction to review, because § 732(c) is applicable to this case. The motion was argued with the hearing of the case. The Court of Appeals sustained this motion and dismissed the case.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is In Direct Conflict With the Decision of the Second Circuit in Geo. Kemp Real Estate Co. v. Commissioner, (1953) 205 F. 2d 236, cert. den. 346 U. S. 876, and With Other Courts of Appeals Decisions Determining So-Called "Combination Questions," Herein Cited.

The Second Circuit in that case decided, per curiam opinion, that it had jurisdiction to review the decision of the Tax Court, despite § 732(c). The Tax Court decided the relief issue under § 722 was foreclosed as a matter of law by the application of the doctrine of collateral estoppel, by reason of the judgment of the Tax Court, in a prior case as to the same issue, which denied relief under § 722 with respect to the Petitioner's excess profits taxes for 1941. Thereby claims of the petitioner therein for such relief for subsequent years were barred. The Court of Appeals decided it had jurisdiction to review the question of whether the doctrine of collateral estoppel should have been applied in a § 722 case and said:

> "The decision was not, in the language of the statute [§ 732(c)] 'necessary solely by reason of § 722.'"

Petitioner in the Tax Court in the case at bar invoked the application of the doctrine of collateral estoppel to forbid a reopening and redetermination by Respondent, upon the same facts and the same applicable law, of the right of Petitioner to § 722 relief and the amount thereof, which had been previously determined by the exercise of the special discretionary power and decision of the Respondent's predecessor Commissioner of Internal Revenue, that Petitioner was entitled to relief under § 722, and Respondent made no finding of fraud or other irregularity in the prior discretionary decision. We respectfully urge that the same rule

of law applies to such quasi judicial act of the Commissioner of Internal Revenue, a public officer acting within his jurisdiction, as to the judgments of courts having general jurisdictional powers. Such rule has been recognized as applying to the decisions of Tax Commissioners, holding that neither the prior determination, nor the factors used in computing, nor the result itself, is open to review.

Opposite rulings on the issue of jurisdiction are not warranted or justified by the mere difference that one case involved collateral estoppel by the prior judgment of the Tax Court and the other case involves collateral estoppel by the prior discretionary and administrative decision of the Commissioner of Internal Revenue. **Harry Ferguson Inc. v. United States** (Court of Claims 1956), 146 F. Supp. 836, 842; **Landreth v. Wabash R. Co.** (7th Cir., 1946), 153 F. 2d 98, 100; **H. S. D. Co. v. Kavanagh, Commissioner of Internal Revenue** (6th Cir., 1951), 191 F. 2d 831; 34 C. J. 878, § 1287; 50 C. J. S. 148, § 690.

We respectfully urge that § 732(c) has the following meaning:

> If, in the determination of the excess profits tax liability of petitioner, the decision of any question is **mandatory only and exclusively because** of the provisions of § 722, the Court of Appeals shall not review or redetermine the decision of such question.

The above statute does not provide that it applies **merely** because the disallowance of claims for refund, of excess profits taxes under other statutes, **relates** incidentally to § 722. The statute does not prohibit such review.

In the case at bar, the principles of law and equity, to-wit, credits under other statutes, res judicata, and estoppel, were brought into question in the Tax Court and in the Court of Appeals. It is obvious that these questions do not arise solely and exclusively because of § 722. Nor was the

decision of these questions mandatory solely and exclusively because of § 722, as Petitioner was not "asking" the original determination of relief under § 722, but only credit under other statutes, with reference to loss carry-back and amortization. The determination of the issues presented in the case at bar do not turn **solely** on § 722, and § 732(c) is not applicable.

The fact that the excess profits tax is imposed for annual periods and that each year's tax is a separate claim, does not make inapplicable res judicata, if the case is otherwise an appropriate one for its application. **Cory v. Commissioner Internal Revenue** (3rd Cir., 1946), 159 F. 2d 391; **Dowd-Feder, Inc. v. Commissioner** (6th Cir., 1949), 173 F. 2d 673; **Woodworth, Commissioner of Internal Revenue v. Kales** (6th Cir., 1928), 26 F. 2d 178, 180, 181; **George Kemp R. E. Co. v. Commissioner** (2d Cir., 1953), 205 F. 236; **Larsen v. Northland Transportation Co.**, 292 U. S. 20, 25; **Tait, Collector Internal Revenue v. Western Md. Ry. Co.** (1933), 289 U. S. 620, 624.

No federal statute authorized Respondent by express words or by clear implication to review and set aside the discretionary and administrative decision herein made by his predecessor.

Section 732(c) has been held to be **inapplicable** in cases presenting questions in the following categories:

(1) **Questions deemed to turn on other provisions of law, in addition** to the relief provisions (so-called "combination questions"). Such cases are **Stimson Mill Co. v. Commissioner,** (C. A., 9th) 163 F. 2d 269, cert. den. 332 U. S. 8[illegible]; **Dowd-Feder, Inc. v. Commissioner,** (C. A. 6th), 173 F. 2d 673; **Dayton Rubber Co. v. Commissioner,** (C. A., 6), 249 F. 2d 2. See **May Seed and Nursery Co. v. Commissioner,** (C. A. 8, 1957), 242 F. 2d 151; cert. denied 355 U. S. 839. Somewhat analogous is **United States v. California Eastern Lines** (1954), 348 U. S. 351.

(2) **Questions of res judicata.**

The Second Circuit decided **Geo. Kemp Real Estate Co. v. Commissioner**, 205 F. 2d 236, and held that § 732(c) was not applicable, as the rationale of that decision was that **the question of collateral estoppel turned on provisions of law other than § 722.**

(3) **Questions whether issues independent of the right to relief** (so-called "Standard issues" such as the allowability of deductions) could be raised in a relief proceeding. **Commissioner v. S. Frieder & Sons Co.**, 228 F. 2d 478 (C. A. 3); **Commissioner v. Blue Diamond Coal Co.**, 230 F. 2d 312 (C. A. 6, 1956); **Commissioner v. Seminole Mfg. Co.**, 233 F. 2d 395 (C. A. 5, 1956); see **Crowell-Collier Pub. Co. v. Commissioner**, 1958 P.-H. Tax Rep., Par. 58-5229.

In the case at bar, Petitioner sought review by the Court of Appeals on questions falling within the above categories (1) and (2), embracing cases in which the appellate courts have reviewed determinations of the Tax Court (1) on issues turning on other provisions of law in addition to the relief provisions and (2) of questions of res judicata.

B. The Question As To Application of § 732(c) Is One of Substantial and Continuing Importance.

Limitations upon the jurisdiction of the Court of Appeals to review decisions of the Tax Court of the United States, in cases involving excess profits taxes, should be settled by the Supreme Court.

The question presented here is an important question of federal law not heretofore decided by this court, for the following reasons:

On June 30, 1958, the Sixth Circuit held this statute applicable in **The Patent Button Company v. Commissioner**, 256 F. 2d 726. In that case no CABPNI had ever been al-

lowed the Petitioner and no issue was presented involving the principles of collateral estoppel.

On October 7, 1958, the Second Circuit held this statute applicable in **Crowell-Collier Publishing Co. v. Commissioner,** 1958 P.-H. Fed. Tax Report, § 58-5229. Petition for writ of certiorari No. 500, this term, is pending. Prior to that case no CABPNI had ever been allowed that petitioner, and no issue was presented involving the principles of collateral estoppel.

On October 29, 1958, the Sixth Circuit held this statute applicable in the case at bar on the authority of its prior decision in the **Patent Button** case, supra.

As previously stated, this question has been presented, in numerous other cases and may be expected to be presented in still other cases. There are a number of cases involving excess profits taxes pending in the various Courts of Appeals. A large volume of such cases, containing similar questions, is still pending in the Tax Court of the United States, and before the Treasury Department. In addition, there is an undetermined number of cases involving, among other questions, relief under the abnormality previsions, pending at various administrative stages in the Internal Revenue Service.

The importance of this question is further indicated by the cases in the various categories previously cited herein. They present but a few of the many cases, presenting questions as to excess profits tax relief and other questions, which have been litigated.

Any conflict of decisions among the lower courts on this important point of Federal law should be resolved by the Supreme Court, so that the application of this statute will be uniform throughout the United States.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted, so that the conflict herein with the decision of the Second Circuit in the **George Kemp Real Estate Company** case, supra, and with the above decisions determining so called "combination questions," herein cited, may be resolved, and may be settled by the Supreme Court, and the Courts of Appeals be relieved of the burden of repeatedly deciding various aspects of their power to review determinations of questions by the Tax Court in cases involving relief under § 722.

Respectfully submitted,

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December, 1958

APPENDIX A

No. 13,386

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BRADFORD MACHINE TOOL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

(Argued October 21, 1958) (Decided October 29, 1958)

ORDER

Before ALLEN, Chief Judge; SIMONS, Circuit Judge, and JONES, District Judge.

The motion of the respondent to dismiss the petition upon the ground that this court has no jurisdiction must be sustained. The case falls within the prohibition of Section 732 (26 U. S. C., 1952 edition, Section 732). A refund of tax has been disallowed herein by the Commissioner, the disallowance **relating to Section 722** (26 U. S. C., 1952 edition, Section 722), the section for relief as to abnormalities. No question under any provision of the tax laws other than Section 722 was involved and **no principle of general law or equity was brought into question here except** as applied to relief asked under Section 722. Cf. **Standard Hosiery Mills, Inc. v. Commissioner of Internal Revenue,** 249 Fed. (2d) 469, 471 (C. A. 4). The determination of the question pre-

sented under this record is necessary solely by reason of Section 722. The case falls squarely within the holding of this court in **Patent Button Company of Tennessee v. Commissioner of Internal Revenue**, 256 Fed. (2d) 726. Courts of Appeals have no jurisdiction to review or redetermine the decision of the Tax Court in such cases. **Standard Hosiery Mills, Inc. v. Commissioner of Internal Revenue, supra; Brown Paper Mills Company, Inc. v. Commissioner of Internal Revenue**, 255 Fed. (2d) 77 (C. A. 5).

The petition for review is dismissed.

Approved for entry:

/s/ FLORENCE E. ALLEN,
Chief Judge,
United States Court of
Appeal.

APPENDIX B

(205 F. 2d 236)

GEORGE KEMP REAL ESTATE CO.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 62, Docket 22373

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued May 6, 1953
Decided June 18, 1953

Petition to review a decision of the Tax Court of the United States, C. Rogers Arundell, J., 17 T. C. 755, that petition was not entitled to relief under 26 U. S. C. A. § 722(a), (b)(5) with respect to excess profits taxes for 1941 to 1944 inclusive. The Court of Appeals, Per Curiam, held that under principles of collateral estoppel a prior decision of Tax Court denying relief with respect to excess profits taxes for 1940 barred subsequent claims for relief with respect to such taxes for later years.

Decision affirmed.

Alexander S. Andrews, New York City, for petitioner.

Appendix B

H. Brian Holland, Asst. Atty. Gen., Ellis N. Slack and Harry Marselli, Special Assts. to the Atty. Gen., for Commissioner of Internal Revenue, respondent.

Before AUGUSTUS N. HAND, CHASE and CLARK, Circuit Judges.

Per Curiam.

Since the Tax Court based its decision on the **application as a matter of law of the doctrine of collateral estoppel**, we have jurisdiction to review despite the provisions of § 732 (c) of the Internal Revenue Code, 26 U. S. C. A. § 732(c). Compare H. Fendrich, Inc. v. Commissioner, 7 Cir., 192 F. 2d 916 with George Kemp Real Estate Co. v. Commissioner, 2 Cir., 182 F. 2d 847, certiorari denied 340 U. S. 852, 71 S. Ct. 80, 95 L. Ed. 624. **The decision was not, in the language of the statute, "necessary solely by reason of section . . . 722."**

The principles of collateral estoppel were correctly applied and the decision is affirmed on the opinion of the Tax Court, 17 T. C. 755.

APPENDIX C

Internal Revenue Code of 1954

Sec. 7482. COURTS OF REVIEW.

(a) Jurisdiction—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) Powers.

(1) To Affirm, Modify, or Reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * * *

Sec. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within three months after the decision is rendered. . . .

Internal Revenue Code of 1939

(Sections 732, 710, 712, 713, 714, 722, 729)

Appendix C

Sec. 732 REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) **Petition to Tax Court. If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b)(1)(H), (I), (J), or (K), section 721 or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail.** Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) **the taxpayer may file a petition with the Tax Court for a redetermination of the tax under this subchapter.** If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) **Deficiency Found by the Tax Court in Case of Claim.** If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which **the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a)** and the Tax Court further finds that there is a deficiency for such year, **the Tax Court shall have jurisdiction to determine the amount of such deficiency** and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) **Finality of Determination. If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.**

(d) Review by Special Division of the Tax Court. The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721(a)(2)(C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

Sec. 710. IMPOSITION OF TAX.

(a) **Imposition.**

(1) **General Rule. There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation** (except a corporation exempt under section 727) **a tax** equal to whichever of the following amounts is the lesser:

* * * * *

(b) **Definition of Adjusted Excess Profits Net Income.** As used in this section, the term **"adjusted excess profits net income" in the case of any taxable year means the excess profits net income** (as defined in Section 711) **minus the sum of:**

(1) **Specific exemption.** A specific exemption of $5,000;

(2) **Excess profits credit. The amount of the excess profits credit allowed under Section 712;** and

(3) **Unused excess profits credit.** The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) **Unused Excess Profits Credit Adjustment.**

(1) Computation of unused excess profits credit adjustment. The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) Definition of unused excess profits credit. The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. . . .

(3) **Amount of unused excess profits credit carry-back and carry-over.** (Previous quoted p. 3 hereof.)

Sec. 712 EXCESS PROFITS CREDIT—ALLOWANCE.

(a) Domestic Corporations. In the case of a domestic corporation which was in existence before January 1, 1940, **the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the Tax under this subchapter is being computed.** . . .

* * * * * *

Sec. 713. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) **Amount of Excess Profits Credit. The excess profits credit for any taxable year, computed under this section, shall be——**

(1) Domestic corporation. In the case of a domestic corporation——

(A) **95 per centum of the average base period net income,**

* * * * * *

(b) Base Period.

(1) **Definition.** As used in this section the term "base period"

(A) If the corporation was in existence during the whole of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the period commencing with the beginning of its first taxable year beginning after December 31, 1935, and ending with the close of its last taxable year beginning before January 1, 1940; and

* * * * *

(e) **Average Base Period Net Income—General Average.** The average base period net income determined under this subsection shall be determined as follows:

* * * * *

(f) **Average Base Period Net Income—Increased Earnings in Last Half of Base Period.** The average base period net income determined under this subsection shall be determined as follows:

* * * * *

Sec. 714. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

* * * * *

Sec. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) **General Rule.** In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used

as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter.

* * * * *

(b) **Taxpayers Using Average Earnings Method.** The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an adequate standard of normal earnings because——

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

* * * * *

(d) **Application for Relief Under This Section. The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section,** except as provided in section 710(a)(5). **The benefits of this section shall not be allowed unless the taxpayer** within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section **makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been deter-**

mined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

Sec. 729. LAWS APPLICABLE.

(a) General Rule. All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

Treasury Regulations 112.

Sec. 35.722-5. APPLICATION FOR RELIEF UNDER SECTION 722.

(a) Requirements for filing. Except as provided in section 710(a)(5) and section 35.710-5 (relating to deferment of payment of excess profits tax in certain cases under section 722) and **except as provided in (d) of this section, the taxpayer is not permitted to claim the benefits of section 722 in computing its excess profits tax on its return, but must compute its excess profits tax, file its excess profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722. To obtain the benefits of section 722 for any taxable year, the taxpayer must,** within the period of time for filing a claim for credit or refund and subject to the limitation as to amount of credit or refund prescribed by section 322 as applicable to the taxable year for which relief is claimed, **file under**

oath an application on Form 991 (revised January 1943) for the benefits of section 722, unless the taxpayer has deferred on its return a portion of its excess profits tax under section 710(a)(5), or **unless the provisions of (d) of this section are applicable to the taxpayer.**

* * * * *

A separate application on Form 991 (revised January 1943) shall be filed for each taxable year for which relief is claimed under section 722, except as otherwise provided by (d) of this section. If an application for relief (whether under section 722 prior to its amendment by the Revenue Act of 1942 or after such amendment) has been filed for any excess profits tax taxable year prior to the current taxable year for which relief is claimed, the supporting data and information submitted with such earlier application need not be repeated on Form 991 (revised January 1943), filed for the current taxable year provided reference is made to such earlier application as constituting part of Form 991 (revised January 1943), filed for the current taxable year. If the grounds for relief and the amount of the constructive average base period net income claimed for use in computing the excess profits tax for the current taxable year are the same as those contained in an application for relief filed with respect to a prior taxable year, and if a constructive average base period net income has not been determined which under the provisions of (d) of this section may be used by the taxpayer in computing its excess profits tax for the current taxable year for which relief is claimed, only the first page and pertinent lines of Schedule A, Form 991 (revised January 1943), for the current taxable year need be executed under oath provided that the date and information filed with the application for such prior taxable

year are incorporated by reference in the application for the current taxable year. **See (d) of this section for requirements with respect to application for the benefits of section 722 where relief has been determined for a prior taxable year.**

* * * * *

(d) **Waiver of limitations for subsequent taxable years.** The taxpayer shall file an application for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. However, **if a constructive average base period net income has been finally determined under section 722(a) with respect to the taxpayer or if permission is granted by the Commissioner after a determination which has not become final, such taxpayer may use the constructive average base period net income so determined, except as further adjustments may be required by section 711(b), in computing its excess profits credit based on income, its adjusted excess profits net income, and its excess profits tax in any return required to be filed thereafter.** If the taxpayer is of the opinion that, by virtue of **a change in the factors upon the basis of which relief has been determined for a prior taxable year,** it is entitled to a constructive average base period net income in a subsequent taxable year in an amount less than that previously determined, it may use such smaller amount as a constructive average base period net income in computing its excess profits tax on its return filed for such subsequent year. **If upon examination of a return in which the taxpayer,** in accordance with the two preceding sentences, **has used, in whole or in part, a constructive average base period net income previously determined, the Commissioner may, if**

the facts in the case warrant such action, determine that for the taxable year no constructive average base period net income under section 722 is allowable or that a constructive average base period net income is allowable in a different amount.

If all or a portion of a constructive average base period net income determined for a prior taxable year is used by the taxpayer in computing the excess profits credit based on income in its return for a subsequent taxable year, such use shall be deemed to be an application by the taxpayer for the benefits of section 722 for such subsequent year to the extent of the constructive average base period net income so used in the return. Such application shall be deemed to include all the information and data submitted in support of all prior applications for relief which have been filed by the taxpayer. If the facts and circumstances which affected the taxpayer during the base period and which formed the basis of a claim for relief under section 722(b)(4) or (5) or section 722(c) for a prior taxable year are not present or are different during the subsequent taxable year for which all or a portion of the constructive average base period net income previously determined with respect to such claim is used by the taxpayer on its return in computing its excess profits credit, the taxpayer shall file with its excess profits tax return for such subsequent taxable year a statement containing a brief description of such facts and circumstances and an account of their effect upon the business of the taxpayer for such subsequent taxable year. For example, if a constructive average base period net income had been determined for a taxpayer because of a change in the character of the taxpayer's business accomplished through the acquisition and operation by the taxpayer of an additional plant during the base period, and if

such plant had been abandoned in a year subsequent to the year for which the determination had been made, the taxpayer's statement should state this fact. If it is the opinion of the Commissioner that the taxpayer is not entitled to relief for such subsequent year, or is entitled to relief in an amount less than that previously determined and used in the computation of the excess profits credit in the return for such subsequent year, the Commissioner may disallow the application for relief for that year in whole or in part.

* * * * *

Eligibility for relief and a constructive average base period net income finally determined on behalf of a taxpayer with respect to an excess profits tax taxable year may have to be reestablished with respect to a subsequent taxable year if:

(Note: then follow six examples, none of which are applicable herein. Ex. 31-EE, App. 79a and 80a, quotes them.)

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No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE BARBOUR MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLA,
Attorneys,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 607

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 85a–87a) is not reported. The opinion of the court of appeals (Pet. 24–25) is reported at 260 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1958. The petition for a writ of certiorari was filed on December 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court's denial of relief under § 722 of the Internal Revenue Code of 1939 may—notwithstanding the provision of § 732(c) that the Tax Court's determination of any question "necessary

solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court"—be reviewed with respect to the taxpayer's contention that the previous administrative allowance of some relief under § 722 for prior taxable years precluded the Commissioner from making a new determination and disallowing relief as to subsequent taxable years.

STATUTE INVOLVED

Section 732(c) of the Internal Revenue Code of 1939 (as added, 55 Stat. 17, and amended, 26 U.S.C. (1952 ed.) 732(c)) provides:

> (c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

STATEMENT

For its excess profits tax years 1940 and 1941, the taxpayer was administratively granted some relief under § 722 of the Internal Revenue Code of 1939 upon the allowance of a "constructive average base period net income" to be used in determining its "excess profits credit" for those years.[1] The Commissioner subsequently disallowed identical claims for relief for the taxable years 1942–1945. On petition

[1] The nature of the relief authorized by § 722 is summarized in the Memorandum for the Respondent (pp. 6–8) filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term.

to the Tax Court, taxpayer contended that the previous administrative determination of a "constructive average base period net income" was binding on the Commissioner and that the Commissioner could not make a new determination as to the right to relief for later years. The Tax Court rejected that contention and, since taxpayer introduced no evidence in support of its claims for relief for 1942–1945, denied relief (R. 85a–87a). The court of appeals dismissed the petition for review on the ground that appellate review of the Tax Court's decision was barred by § 732(c) (Pet. 24–25).

DISCUSSION

Since the sole issue in this case was the taxpayer's right to relief under § 722,[2] the determination of the "estoppel" question was made "necessary solely by reason of section * * * 722" and review of the question on appeal was clearly precluded by § 732(c).[3]

[2] Petitioner's claims that other issues are involved are frivolous. There would be no unused excess profits credit for 1944 to be carried back to 1942 and 1943 under § 710(c)(3)(A) unless § 722 relief were first granted for 1944. That the statute of limitations in § 275 bars any further assessments for 1941 is true but irrelevant; the only years involved here are 1942–1945. The claim to an increased amortization deduction under § 124, which has nothing to do with the relief issue, was raised neither in the Tax Court nor in the court of appeals.

[3] While we do not believe that the merits of the estoppel contention are relevant to the question before the Court, it may be noted that petitioner's reliance on § 722(d) and the regulations thereunder is misplaced. The provisions relied on are purely procedural. Normally a taxpayer claiming a right to relief under § 722 is required to file a return, and pay the tax, without regard to his claim for relief and then file an application for relief by way of a claim for refund. See § 722(d). However, when use of a constructive average base period net income has

There is no conflict with the decision of the Second Circuit in *George Kemp Real Estate Co.* v. *Commissioner*, 205 F. 2d 236, certiorari denied, 346 U.S. 876. There the Tax Court, in a proceeding involving one excess profits tax year, held that the taxpayer's income during the base period had not been depressed by factors which, under § 722, would permit a "constructive" average base period net income to be used in determining the excess profits credit. In a second proceeding before the Tax Court involving claims for relief upon the same ground for subsequent years, the Tax Court held that the issue of the normalcy of the taxpayer's base period income was controlled by the prior decision under principles of collateral estoppel and could not be relitigated. The court of appeals held that it could review the application of res judicata, and affirmed the decision of the Tax Court. In this case, the contention is not one of res judicata but one of the binding effect of a prior unlitigated administrative grant of relief for different taxable years. Moreover, the effect of the Tax Court's decision in the *Kemp* case was to deny the taxpayer any hearing on his right to relief for the years there involved—an effect similar to that of a denial by the Tax Court of

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been allowed for one year, the taxpayer is permitted, as provided in the regulations, to assert his claim for similar relief on his returns thereafter filed for subsequent years, and the returns themselves are then treated as applications for relief. See Treas. Regs. 112, § 35.722-5(d), as amended by T.D. 5393, 1944 Cum. Bull. 415. In short, the last sentence of § 722(d) simply relieves the taxpayer, in the stated circumstances, of the requirement that he pay the full tax before seeking relief. It has nothing to do with the substantive effect of the prior determination.

its own jurisdiction—whereas here the taxpayer was afforded an opportunity to establish its right to relief but failed to do so.

As shown by the Memoranda for the Respondent filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term, certiorari denied, December 8, 1958, and *Crowell-Collier Pub. Co.* v. *Commissioner*, No. 500, this Term, certiorari denied, January 12, 1959, the Commissioner believes there is a need for definitive clarification of the scope and effect of § 732(c), especially in view of the underlying inconsistency between the rationale of the opinion below and that of the Ninth Circuit in *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3. It is recognized, however, that the reasons for granting the writ in this case are no more compelling than those urged in the earlier cases, except as this additional case serves to emphasize the broad scope of the underlying problem.

Respectfully submitted.

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JANUARY 1959.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 607.

THE BRADFORD MACHINE TOOL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT

The Memorandum for the Respondent (p. 5), filed herein, states that the Commissioner believes there is a need for definitive clarification of the scope and effect of § 732(c), and this additional case serves to emphasize the broad scope of the underlying problem. Petitioner herein urges that a Writ of Certiorari be granted in this case for the above reason and considering the following facts:

Petitioner does not contend that the Respondent has no right to make a new determination as to the right of Petitioner to § 722 relief for subsequent years under the statute. Petitioner recognizes that the Respondent has

such right, not where the facts remain the same, but where the facts with respect to the base period years, 1936 to 1939, have changed after the prior determination of the Respondent's predecessor that Petitioner is entitled to § 722 relief.

Respondent stresses in his memorandum (p. 3) that Petitioner introduced no evidence in support of its claims for relief for 1942 to 1945. This is true only with respect to evidence qualifying Petitioner initially for relief under § 722. The Petitioner did produce sufficient evidence in support of its claims for relief for 1942-1945, by reason of estoppel by the prior decision of Respondent's predecessor, by producing in evidence (1) the previous discretionary and administrative allowance of relief under § 722 and the determination of the amount of the CABPNI allowed by Respondent's predecessor for the taxable years 1940 and 1941; (2) that there was no change in the facts, with respect to the base period years 1936 to 1939 at the time of the prior determination, requiring any statutory adjustment in the CABPNI, previously allowed, in order to use it for any subsequent taxable year, pursuant to § 722(a); and (3) that the Respondent in 1952, in disregard of the discretionary and administrative decision of his predecessor, proceeded to reconsider the same evidence, as to the base period years upon which his predecessor acted and had determined Petitioner was entitled to relief under § 722, and to come to an opposite determination on the same facts.

Counsel for Petitioner does not comprehend why the Respondent, its counsel and the Tax Court do not apply the statute, § 722(a) that, after a decision that the taxpayer is entitled to relief under § 722 and the amount of its CABPNI has been determined, "the tax shall be determined by using such CABPNI, in lieu of the CABPNI otherwise determined under this sub-chapter." The

CABPNI is the basis of the excess profits credit of Petitioner for all excess profits tax payable years. The excess profits tax does not apply to the excess profits credit. It applies only to the Petitioner's income during each excess profits tax taxable year in excess of the excess profits credit. The CABPNI is the statutory amount of § 722 relief, to which the taxpayer is entitled, for each subsequent excess profits tax taxable year, so long as the facts, with respect to the base period 1936 to 1939, inclusive, upon which its determination and allowance are based, remain unchanged. Petitioner contends that the Commissioner had no authority, as a matter of law, to disregard the prior discretionary and administrative decision of his predecessor, under any Federal statute, or to review and set aside such prior decision, and that Petitioner, as a matter of law, had the right to apply and use, for each subsequent excess profits tax taxable year, its right to relief under § 722(a), previously allowed.

Respondent contends (p. 4) that the questoin is not one of res judicata, but one of the binding effect (estoppel) of the prior unlitigated administrative grant of relief for prior taxable years. Yes, it was unlitigated, because the taxpayer did not seek review by the Tax Court, Respondent's predecessor having granted in part taxpayer's application for § 722 relief at that time, and Petitioner did not wish to litigate for the balance thereof. Is this statute to be construed in accordance with a policy to promote litigation, or to the contrary? The determination of the estoppel question was made necessary, not solely by reason of § 722, but by reason of the prior discretionary and administrative decision of Respondent's predecessor, under the equitable principles of estoppel. They apply to discretionary and administrative decisions of the Commissioner of Internal Revenue, taxing commissioners, boards or offi-

cers, which are quasi judicial acts of such officers and boards acting within their jurisdiction.

Respectfully submitted,

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February 10, 1959.

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No. 607

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 607

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

In the Memorandum for the Respondent filed in this case, an inconsistency between the decision below and that of the Ninth Circuit in *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3, was suggested. After remand of the *Helms Bakeries* case to the Tax Court, the Tax Court made additional findings and the case was again appealed to the Ninth Circuit. On February 3, 1959, the Ninth Circuit announced its opinion on the second appeal, overruling its first decision and dismissing the appeal for lack of jurisdiction under § 732(c) of the Internal Revenue Code of 1939. A copy of the opinion is printed in the Appendix, *infra*. The action of the Ninth Circuit in overruling the first *Helms Bakeries* decision eliminates any inconsistency of decisions and thus any need for review of

the question by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1959.

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*It also eliminates the conflict of decisions pointed out in the Memoranda for the Respondent filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term, certiorari denied, 358 U.S. 906, and *Crowell-Collier Pub. Co.* v. *Commissioner*, No. 500, this Term, certiorari denied, January 12, 1959.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,574 Feb. 3, 1959

HELMS BAKERIES, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Petition to Review a Decision of the Tax Court of the United States

Before: ORR, CHAMBERS and JERTBERG

JERTBERG, *Circuit Judge:*

This is a second appeal in a case involving determination of federal excess profits taxes for the calendar years 1943, 1944 and 1945. The decision of this Court on the first appeal appears in 236 F. 2d, page 3.

The issues presented to the Tax Court, whose decision was reviewed on the first appeal, related exclusively to the petitioner's right to relief under section 722 of the Internal Revenue Code of 1939[1] for the

[1] Sec. 722(a) reads: "In any case in which a taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used for a constructive average base period net income for the purposes of an

calendar years above stated. Petitioner was in existence during the entire base period—1936 to 1939 inclusive—and was entitled to use an excess profits credit based on income under the provisions of section 713 of the Code. The pertinent sections before the Court were 722(b)(2)[2] and section 722(b)(4).[3] Specifically, the petitioner rested its claim to the right to section 722 relief for the taxable years upon two grounds: (1) that its base period earnings were depressed by reason of a price war within the purview of section 722(b)(2), and (2) that it had increased its capacity for production and operation within the purview of section 722(b)(4). After trial, the Tax Court held that petitioner was not entitled to any relief under section 722(b)(2) or section 722(b)(4). 23 T.C. 967. This Court held on the first appeal that because of the

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excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *"

[2] Under section 722(b)(2) relief is allowed if "the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer, or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

[3] Under section 722(b)(4) relief is allowed if "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *" It is also provided under that section that "if the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. * * *" The term "change in the character of the

provisions of section 732(c) of the Code[4] that it was without jurisdiction to pass upon the issue of relief claimed under section 722(b)(2) and dismissed for lack of jurisdiction the petition for review insofar as it related to that issue.

The petitioner sought relief under section 722(b)(4) upon the basis of a change in its capacity for operation and production occurring within the base period. The Tax Court found that "During the base period there was a change in the productive capacity of the petitioner. Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales." The Tax Court made no finding on the issue of a change in the petitioner's capacity for operation occurring within the base period.

We held that under a fair construction of the finding of the Tax Court there was an available market in 1937 for additional production, and that in view of the evidentiary finding of the Tax Court on this subject its conclusion "Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales" was arbitrary and contrary to its own finding. We further stated that the Tax Court should have made a finding as to whether or not, if this increase in capacity for production had been made two years earlier, a higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof. The judgment of this Court on the remand became final, and the Com-

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business" is defined in the section to include "a difference in the capacity for production or operation."

[4]Section 732(c) provides: "If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1), (I), (J) or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

missioner did not seek review of our decision by petition for certiorari. The Tax Court rendered a new opinion, 28 T.C. 79, which was reviewed by the special division of the Tax Court, which concluded with the following statement: "Upon reconsideration of the same factors and the entire record, we are convinced and find that its reconstructed average base period net income would not exceed that which respondent has accorded it under section 713(f) of the Internal Revenue Code of 1939." Pursuant to that opinion the Tax Court rendered its decision that there are no refunds of excess profits taxes due to the petitioner for the tax years 1943, 1944 and 1945 under the provisions of section 722, Internal Revenue Code of 1939.

The Commissioner contended on the first appeal that this Court was without jurisdiction to entertain the first appeal because of the prohibition contained in section 732(c), and as construed in *James F. Waters, Inc.* v. *Commissioner of Internal Revenue,* 160 F. 2d 596 (C. A. 9th), certiorari denied 332 U.S. 767; *Corn Products Refining Co.* v. *Commissioner of Internal Revenue,* 215 F. 2d 513 (C.A. 2d), certiorari denied 348 U.S. 911; *Colonial Amusement Co. of Philadelphia* v. *Commissioner of Internal Revenue,* 173 F. 2d 568 (C.A. 3d); *Colorado Milling & Elevator Co.* v. *Commissioner of Internal Revenue,* 205 F. 2d 551 (C.A. 10th); *George Kemp Real Estate Co.* v. *Commissioner of Internal Revenue,* 182 F. 2d 847 (C.A. 2d), certiorari denied 340 U.S. 852; *A. B. Frank Co.* v. *Commissioner of Internal Revenue,* 211 F. 2d 497 (C.A. 5th).

The Commissioner recognizes that the "law of the case" rule would normally preclude reconsideration on this appeal of the determination made by this Court on the first appeal that this Court was not pre-

cluded by section 732(c) from assuming jurisdiction to pass upon the issue of relief claimed under section 722(b)(4). Nevertheless, the Commissioner urges us to reconsider and reexamine our prior holding on this point.

Since our decision on the first appeal the general question before us has been considered by other circuits. *Standard Hosiery Mills, Inc.* v. *Commissioner of Internal Revenue,* 249 F. 2d 469 (C.A. 4th); *The Crowell-Collier Publishing Co.* v. *Commissioner of Internal Revenue,* 259 F. 2d 860 (C.A. 2d), certiorari denied January 12, 1959; *Brown Paper Mill Co.* v. *Commissioner of Internal Revenue,* 255 F. 2d 77 (C.A. 5th), certiorari denied December 8, 1958; *The Patent Button Co. of Tennessee* v. *Commissioner of Internal Revenue,* 256 F. 2d 726; *Bradford Machine Tool Co.* v. *Commissioner of Internal Revenue,* 260 F. 2d 950 (C.A. 6th).

We have carefully reexamined the record in this case, and have reviewed our decision on the first appeal in the light of decisions cited by counsel before and after the submission of this cause. We have reached the conclusion that we were in error in assuming jurisdiction on the first appeal in respect to petitioner's claim for relief under section 722(b)(4). The "law of the case" rule does not preclude us from overruling our prior decision on being convinced that our prior holding was erroneous. *White* v. *Higgins,* 116 F. 2d 312, and cases cited therein. Our decision on the first appeal, reported in 236 F. 2d 3, is overruled insofar only as it relates to section 722(b)(4) relief. The petition for review on the present appeal is dismissed for lack of jurisdiction.

(Endorsed:) Opinion. Filed Feb. 3, 1959.

PAUL P. O'BRIEN, *Clerk.*

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